Two means two, but must does not mean must: an analysis of recent decisions on the conditions for parental orders in surrogacy

Alan Brown*

Keywords: Surrogacy – parental orders – Human Fertilisation and Embryology Act 2008 – statutory interpretation

This article examines the High Court decisions in Re Z (A Child) *and* Re X (A Child) (Surrogacy: Time Limit), *which concerned two of the conditions for the granting of 'parental orders' after surrogacy in section 54 of the Human Fertilisation and Embryology Act 2008. The article observes that the strict approach employed in* Re Z *to the interpretation of the requirement that an application be made by 'two people' in section 54(1), contrasts with the 'liberal' approach taken in previous cases, including* Re X, *concerning the six-month 'time limit' during which applications 'must' be made in section 54(3). This article suggests that the judgments do not fully engage with this divergence, instead presenting the different approaches as an uncontroversial matter of statutory interpretation. The article argues that these different outcomes can be explained by the continuing policy significance of the two-parent model within the attribution of legal parenthood in cases of assisted reproduction. The article concludes that the contrasting and contradictory reasoning of these decisions illustrates the need for wholesale legislative reforms of surrogacy arrangements.*

Introduction

The legal regime regulating surrogacy in the UK remains restrictive,[1] as surrogacy continues to be regulated by the Surrogacy Arrangements Act 1985 (the 1985 Act), which renders 'surrogacy arrangements' unenforceable[2] and prohibits commercial surrogacy.[3] The Human Fertilisation and Embryology Act 2008 (the 2008 Act),[4] provides the statutory framework for determining legal parenthood in all cases of assisted reproduction.[5] The 2008 Act governs the process of

* Lecturer in Law, Abertay University, a.brown@abertay.ac.uk. I would like to thank Lynsey Mitchell, Rhonda Powell, Philip Bremner, Michelle Weldon-Johns and the anonymous reviewers for their helpful comments on earlier drafts of this paper. Any errors that remain are my own.

1 C Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Review Law* 59, at p 61, observes that, 'the legislative framework for recognising a birth through a surrogacy arrangement is highly restrictive'.

2 Section 1A.

3 Section 2, the operation of a commercial surrogacy agency is an 'offence', s 2(2).

4 This is amending legislation, designed to 'modernise' the original Human Fertilisation and Embryology Act 1990 (the 1990 Act). For academic critique of the 2008 Act, see, for example, M Fox, 'The Human Fertilisation and Embryology Act 2008: Tinkering at the Margins' (2009) 17(3) *Feminist Legal Studies* 333.

5 Section 33 defines 'mother' on the basis of gestation, 'father' is defined in ss 35–37 with different conditions depending upon whether the father is married to the mother, and ss 42–44 defines 'female parenthood' in cases involving a female same-sex couple, using similar rules as those for 'fathers'.

applying for 'parental orders';[6] the order through which legal parenthood is transferred from the surrogate mother (and potentially her husband)[7] to the intended parents, without the need to go through the full adoption process.[8]

The 1985 Act was based upon the report of the Warnock Committee,[9] which was completely opposed to surrogacy and expressed this disapproval in avowedly moral terms, stating: '[e]ven in compelling medical circumstances the danger of exploitation of one human being by another appears . . . far to outweigh the potential benefits, in almost every case'.[10] Over thirty years after the passage of the 1985 Act, the legal regime continues to be underpinned by this unfavourable conception of surrogacy and, as Amel Alghrani and Danielle Griffiths observe, 'since 1985, the law governing surrogacy has developed in a haphazard fashion and piecemeal changes made over the years have resulted in a regulatory framework that is contradictory and confusing for all involved'.[11] In spite of this background, in recent years[12] there has been evidence of increasing incidences of surrogacy,[13] with particular growth observed in international surrogacy.[14] This rise of surrogacy arrangements suggests that the legislative approach, underpinned by moral disapproval, is no longer representative of contemporary social attitudes towards the desirability of surrogacy[15] and therefore may no longer be fit for purpose in 21st century UK society. The continual growth in the practice of surrogacy lends support to the idea that overarching reform of the legal regulation of surrogacy should be undertaken.[16] Indeed, the Law Commission has recently announced the inclusion of surrogacy within its 13th Programme of Law Reform,[17] commenting that, '[w]e take the view that the law relating to surrogacy is outdated and unclear, and requires comprehensive reform'.[18]

Due to the existence of this restrictive regulatory regime, the consequences of surrogacy within the wider regulation of assisted reproduction have not necessarily or regularly been afforded significant consideration within legislative reforms. Sally Sheldon and Kirsty Horsey have observed that, '[t]he law relating to the attribution of legal parenthood is poorly designed to

6 Section 54; these provisions were further amended by Sch 1 of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985) (the 2010 Regulations).

7 Section 35(1).

8 Section 54(1) states, '[o]n an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants'.

9 *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cm 9314 (1984), available at: www.bioeticacs.org/iceb/documentos/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf.

10 Ibid, at para 8.17.

11 A Alghrani and D Griffiths, 'The regulation of surrogacy in the United Kingdom: the case for reform' [2017] CFLQ 165, at p 166.

12 Official figures regarding the number of surrogacies are difficult to obtain due to the unregulated nature of surrogacy. The non-profit organisation Childlessness Overcome Through Surrogacy (COTS) states it has been involved in over 1000 surrogate births since 1988, available at: www.surrogacy.org.uk/aboutsurrogacy.

13 M Crawshaw, E Blyth and O van den Akker, 'The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice' (2012) 34(3) *Journal of Social Welfare and Family Law* 267, at p 269, present data based on correspondence with the General Register Office, showing that there has been a sharp increase in the number of parental orders granted in the UK, with 149 in 2011 compared to 51 in 2007.

14 Ibid, at 271, the authors note that in 2011 26% of parental orders in England and Wales involved a child who had been born abroad, compared to only 2% in 2008.

15 See, for example, K Horsey, 'Surrogacy in the UK: Myth Busting and Reform: Report of the Surrogacy UK Working Group on Surrogacy Law Reform' (Surrogacy UK, November 2015), paras 3.1–3.2, at pp 19–25, which provides data regarding the attitudes of those involved in surrogacy arrangements, available at: www.surrogacyuk.org/Downloads/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf.

16 For recent academic calls for reform, see, for example, K Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' [2010] CFLQ 449.

17 *Thirteenth Programme of Law Reform*, Law Com No 377 (TSO, 2017).

18 Ibid, para 2.44, at p 21.

respond to surrogacy arrangements'.[19] This article focuses upon one aspect of that attribution in cases of surrogacy, the provisions of section 54 of the 2008 Act, which govern applications for 'parental orders'. Section 54 sets out the various conditions that are required to be satisfied for the court to make a parental order;[20] this article argues that the judicial interpretation of these conditions continues to be situated within a binary, two-parent model of legal parenthood. In recent years, a series of cases have come before the High Court concerning the interpretation of these conditions,[21] with the judiciary generally employing what Mary Welstead has described as 'a liberal interpretation of the current law'.[22] This article will consider some of these recent cases, focusing on the judicial interpretation of two of the conditions for the granting of a 'parental order': the six-month 'time limit' during which applications 'must' be made, in section 54(3);[23] and the requirement that the application be 'made by two people', in section 54(1).[24] The article focuses upon these two conditions because in his decisions in *Re X (A Child) (Surrogacy: Time Limit)*[25] and *Re Z (A Child)*,[26] the President of the Family Division, Sir James Munby, employs contrasting approaches, on the basis of questionable reasoning, to reach different conclusions on the interpretation of these two conditions. Therefore, these two decisions encapsulate the problems caused by the High Court's approach to the interpretation of section 54 and illustrate the continuing and pervasive influence of the binary, two-parent model on that judicial approach.

The argument advanced in this article has two strands: (1) that the reasoning of the judgments of Sir James Munby P in *Re Z* and *Re X* is inconsistent and the language used within the judgments is contradictory and, at times, incoherent; and (2) that the distinction between the judgments in *Re X* and *Re Z* can be explained by the binary, two-parent model of legal parenthood continuing to inform the policy underpinning the 2008 Act's approach to the attribution of legal parenthood in all cases of assisted reproduction. The article will conclude by suggesting that the inconsistencies of the judgments in these cases provides further evidence of the need for overarching and fundamental legislative reform of the regulation of surrogacy.

The judicial interpretation of the conditions for granting parental orders

Before examining the approach of the courts to the interpretation of section 54(3) and (1), it is necessary to set out the legislative context in which the provisions of section 54 are considered by the courts. The Human Fertilisation and Embryology (Parental Order) Regulations 2010 (the 2010 Regulations)[27] imported section 1 of the Adoption and Children Act 2002[28] into

19 K Horsey and S Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20(1) *Medical Law Review* 67, at p 87.

20 Section 54(2)–(8).

21 See, for example, *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] Fam 188, which considered the interpretation of ss 54(4) and (5). Moreover, there have been a series of cases considering the meaning of 'expenses reasonably incurred' in s 54(8), including *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71; *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam), [2012] 1 FLR 1347; *Re D and L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 2 FLR 275 and *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297. See further C Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Review Law* 59.

22 M Welstead, 'Surrogacy Update: Part 2' [2015] Fam Law 1103, at 1107. See further C Fenton-Glynn, 'The Regulation and recognition of surrogacy under English law: an overview of the case law' [2015] CFLQ 83.

23 Section 54(3) states, 'the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born'.

24 Section 54(1) states, '[o]n an application made by two people ("the applicants")'.

25 [2014] EWHC 3135 (Fam), [2015] Fam 186.

26 [2015] EWFC 73, [2015] 1 WLR 4993.

27 Schedule 1.

28 Section 1(2) states, '[t]he paramount consideration of the court or adoption agency must be the child's welfare, throughout his life'.

section 54 of the 2008 Act.[29] Consequently, the 'welfare of the child' became the court's 'paramount consideration' in any determination of an application for a parental order.[30] As a result of these regulations, in *Re L (A Child) (Surrogacy: Parental Order)*,[31] Hedley J stated that, '[t]he effect of that must be to weight the balance between public policy considerations and welfare . . . decisively in favour of welfare. It must follow that it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making'.[32] This reference to 'the clearest case of the abuse of public policy' was repeated in subsequent cases[33] and represents the only circumstances in which a parental order will be refused.[34] Therefore, as Claire Fenton-Glynn observes, judges 'have been set an impossible task by the legislature, asked to achieve a balance between public policy and child welfare, while simultaneously being told that there *can be no balance* due to the paramountcy of the children's interests'.[35] It is in this context, where the 'welfare of the child' is the court's paramount consideration and it is highly unlikely that an application will be refused on general public policy grounds, that decisions concerning applications for parental orders are situated. The role of welfare in these decisions prompted the Law Commission to observe that, 'courts have struggled to implement the statutory conditions for a Parental Order because the paramount position of the child's best interests makes it difficult for the court to refuse to recognise an existing relationship between the intended parents and child'.[36] Indeed, it is arguable that the welfare principle, imported by secondary legislation, should not be able to defeat the explicit terms of the 2008 Act; without greater clarity, it is constitutionally questionable that Parliament would be considered to have given the minister the power to alter the primary text of the statute.[37] Moreover, it appears that judges have not grasped the significance of the constitutional limitations (which should have applied) to the use of 'welfare' in this context.[38]

The 'Six Month Time Limit': Re X (A Child) (Surrogacy: Time Limit)[39]

Section 54(3) of the 2008 Act states: 'the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born'. The word 'must' suggests that this is a requirement. Judicial interpretation of this provision appeared to be settled: the six-month period was described in the High Court as 'non-extendable',[40] 'incapable of enlargement'[41] and 'mandatory'.[42] The position was seen as uncontroversial, such that in *J v G*

29 Section 55(1) of the 2008 Act grants the Secretary of State the power to make regulations which provide, 'for any provision of the enactments about adoption to have effect, with such modifications (if any) as may be specified in the regulations, in relation to orders under section 54'. It is through this provision that the 'welfare test' has been imported into the 2008 Act.

30 Prior to the 2010 Regulations, in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, at [10], Hedley J had stated that, 'welfare considerations cannot be paramount but, of course, are important'.

31 [2010] EWHC 3146 (Fam), [2011] Fam 106.

32 Ibid, at [10].

33 See, for example, *J v G (Parental Orders)* [2013] EWHC 1432 (Fam), [2014] 1 FLR 297, per Theis J, at [20].

34 It is not necessarily clear from these judgments (or subsequent decisions where parental orders have been granted in a wide range of cases) what sort of circumstances the court envisages would amount to 'the clearest case of abuse of public policy', such as to justify the refusal to grant a parental order.

35 C Fenton-Glynn, 'The regulation and recognition of surrogacy under English law: an overview of the case law' [2015] CFLQ 83, at p 95.

36 *Thirteenth Programme of Law Reform*, Law Com No 377 (TSO, 2017), para 2.42, at p 21.

37 The use of so-called 'Henry VIII' clauses (in which ministers are explicitly given the power to alter primary legislation) in secondary legislation is constitutionally contentious, see for example AW Bradley, KD Ewing and CJS Knight, *Constitutional and Administrative Law* (Pearson, 16th edn, 2015), at pp 586–587. However, s 55 of the 2008 Act does not even appear to explicitly give the minister the power to alter the text of the primary legislation, but nevertheless the judicial interpretation of the 2010 Regulations appears to have had this consequence.

38 I would like to thank one of the anonymous reviewers for highlighting this point.

39 [2014] EWHC 3135 (Fam), [2015] Fam 186.

40 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, per Hedley J, at [12].

41 *Re S (Parental Order)* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156, per Hedley J, at [9].

(Parental Orders),[43] Theis J observed that, 'parental order applications must be made within six months of the child's birth, there is no power vested in the court to extend that period'[44] and in *JP v LP and Others (Surrogacy Arrangement: Wardship)*,[45] Eleanor King J stated that, '[t]here is no provision within the Act to provide for a discretionary extension to the statutory time limit'.[46] These decisions show that the language of section 54(3) was understood by the judiciary to be clear and unambiguous and the provision was considered to be a mandatory statutory requirement and, as such, parental orders could not be issued if the six-month period had expired prior to the application being made.

However, this position was reversed by the judgment of Munby P in *Re X (A Child) (Parental Order: Time Limit)*.[47] This case concerned a surrogacy arrangement entered into in India; the child (X), who was conceived using the sperm of the intended father and eggs donated by a third party,[48] was born in 2011 and subsequently entered the UK over 18 months later, in 2013, on a British passport.[49] By this point, the six-month time limit set out in section 54(3) had long since elapsed, and at the date of the hearing X was 2 years and 2 months old, the parents apparently having been unaware of the requirement for a parental order.[50] In spite of the seemingly unambiguous statutory language of section 54(3) and the approach consistently adopted by other judges in previous High Court decisions, the President granted the order.[51] This change of judicial interpretation caused Welstead to comment that, 'the decision in *Re X* suggests that there is more than an element of judicial creativity on the part of Munby J in his determination to ameliorate the constraints of s 54 and ensure the future familial relationship of X with his intended parents'.[52]

This 'creativity' is particularly evident from the approach taken to statutory interpretation in *Re X*.[53] The judgment places significant reliance upon the fact that the purpose of the statutory provision was not considered or discussed in the parliamentary debates regarding either the 1990 Act or the 2008 Act, with Munby P observing that, '[i]t is apparent from counsel's researches that in neither House was there any explanation of or discussion about the terms of section 30(2), now section 54(3)'.[54] Expanding upon the significance of this lack of parliamentary discussion or explanation for the provision in *Re X*, the President stated:

> 'Parliament has not explained its thinking, but given the transcendental importance of a parental order, with its consequences stretching many, many decades into the future, can it sensibly be thought that Parliament intended the difference between six months and six

42 *JP v LP and Others (Surrogacy Arrangement: Wardship)* [2014] EWHC 595 (Fam), [2015] 1 FLR 307, per King J, at [29].
43 [2013] EWHC 1432 (Fam), [2014] 1 FLR 297.
44 Ibid, at [29]. See further the very similar form of words used by the same judge in *Re WT (Foreign Surrogacy)* [2014] EWHC 1303 (Fam), [2015] 1 FLR 960, at [42].
45 [2014] EWHC 595 (Fam), [2015] 1 FLR 307.
46 Ibid, at [29].
47 [2014] EWHC 3135 (Fam), [2015] Fam 186.
48 Ibid, at [3].
49 Ibid, at [4].
50 Ibid.
51 Ibid, at [2].
52 M Welstead, 'Surrogacy: One More Nail in the Coffin' [2014] Fam Law 1637, at p 1639.
53 The President's reasoning was heavily reliant upon the line of authority concerning the breach of statutory procedural requirements, beginning with *Howard v Bodington* (1877) 2 PD 203 and more recently considered by the House of Lords in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340. The President quoted from the judgment of Sir Stanley Burnton in *Newbold v The Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288, which stated, at [70]: 'In all such cases, it is necessary to consider the words of the statute . . . in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation . . . would have intended a sensible . . . result'.
54 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [16]. Or as was expressed subsequently by Theis J in *Re A and B (Parental Order)* [2015] EWHC 2080 (Fam), [2016] 2 FLR 446, at [39], 'the lack of detail as to the underlying policy or rationale for the six month time limit in s 54(3)'.

> months and one day to be determinative and one day's delay to be fatal? I assume that Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe section 54(3) as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical.'[55]

The use of this justification for granting the parental order is striking, because in the factual circumstances of *Re X* the application had not been made for a period that was several times longer than the six-month period, rather than 'one day late', but this distinction is not subjected to significant consideration or interrogation within the judgment.[56] As Philip Bremner observes, 'Munby P's reasoning . . . relies heavily on the nature of a parental order and the effect it has on all the parties'.[57] However, the approach to statutory interpretation employed by the President in this judgment,[58] particularly the manner in which the lack of expressed parliamentary intention is utilised, is far from uncontentious.[59] Kenneth Norrie has commented that the President's decision, 'effectively leaves the provision meaningless, contrary to another well-established rule of statutory interpretation, that statutory language needs to be considered in such a way as gives it some substantive effect. To hold that "must" means "may" means that "must" means nothing at all'.[60]

In addition, the President stated that his conclusion was also justified on the basis that section 54(3) could be 'read down'[61] in terms of section 3 of the Human Rights Act 1998.[62] The judgment explicitly endorses the reasoning of *A v P (Surrogacy: Parental Order: Death of Applicant)*,[63] a case which concerned the death of one of the applicants before the parental order was made, but after the application had been sought.[64] In granting the order Theis J stated, '[t]he primary aim of s 54 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants'.[65] It is clear throughout the cases concerning applications for parental orders that this 'transformative effect' is at the forefront of judicial reasoning. Building on this in *Re X*, Munby P emphasised the centrality of recognising the 'identity' of the child, commenting that, '[s]ection 54 goes to the most

---

55 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [55].

56 Ibid, at [64], Munby P acknowledges that, '[i]n one sense that is a long time, both in absolute terms and when compared with the statutory time limit of six months'. However, the longer time period is not apparently considered significant within his reasoning.

57 P Bremner, 'Surrogacy and Single Parents Following *Re Z*' (2017) 21(2) *Edinburgh Law Review* 281, at p 285.

58 The procedural requirements considered in cases in the *Howard v Bodington* (1877) 2 PD 203 line of authority have tended to be much more complex and opaque than the provisions of s 54(3), such that the President's utilisation of those cases as one of the bases for his decision appears somewhat questionable.

59 The problematic assumption which underpins the President's reasoning is that due to the 'transcendental importance' of the parental order to recognising the identity and securing the welfare of the child, Parliament would not have 'sensibly' intended total invalidity if the six-month period was not complied with. However, it is far from clear that the time limit should not be understood in the context of the overwhelmingly prohibitive approach taken to surrogacy by the 1985 and 1990 Acts. Therefore, the lack of clearly expressed parliamentary intention may simply have reflected the fact that Parliament believed the purpose of this provision was to contribute to the discouraging of surrogacy arrangements, through the imposition of a strict time limit for applications.

60 K Norrie, 'English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation' [2017] CFLQ 93, at p 100.

61 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [58].

62 Section 3(1) states: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.

63 [2011] EWHC 1738 (Fam), [2012] Fam 188.

64 Ibid, at [6]–[7].

65 Ibid, at [24].

fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family'.[66]

It is clear that accurately recognising the 'status' and 'identity' of X was a central feature of the President's reasoning and that a parental order was viewed as the only way through which such recognition could be achieved. However, as Robert Lee and Derek Morgan suggest, '[t]he question of genetic status and personal identity is a complex, intermeshing construct of psychological, philosophical, historical, cultural, ethical and legal metrics'.[67] In this and other judgments parental orders are being granted an almost mythic ('transcendental')[68] capacity as a method of recognising and recording the identity of children. I suggest that this understanding of the parental order is highly contestable. It is unclear the extent to which a legal order, that does not even attempt to recognise the full extent of the child's identity (as there is no record required of the sperm or egg donors that may be involved in conception), is capable of serving the 'transformative' function that the judgments are suggesting it serves.[69] Instead, 'identity' is being conflated in the judgments with recognition within a two-parent, nuclear family, which is what a parental order provides to the child and the intended parents.[70]

Subsequent cases considering section 54(3)

The President emphasised at the conclusion of his judgment that: 'I intend to lay down no principle beyond that which appears from the authorities'.[71] However, his approach has been followed in all subsequent reported decisions concerning applications for parental orders outside of the six-month period;[72] this is unsurprising, because as Fenton-Glynn comments, 'there was nothing unique about this case that would make it distinguishable from the many hundreds of other surrogacy cases that go through the courts each year'.[73] Most striking of the reported decisions are *A v C*,[74] where parental orders were granted for three children, a 13-year-old and 12-year-old twins, and *Re A and B (Children)*,[75] where parental orders were granted for two children who were 8 years, 3 months, and 5 years 8 months old at the time of the court hearing.[76] The judgment in *Re A* makes clear that as a consequence of the decision in *Re X*, 's 54(3) should be read as a directive rather than a mandatory deadline and that the court had the power to extend it where the facts demanded that such a discretion should be exercised'.[77] Given the approach taken in the subsequent reported cases and the paramountcy of the 'welfare of the child' in these decisions, it appears that the facts will 'demand' that this

66 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [59].
67 RG Lee and D Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone, 2001), at p 217.
68 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, per Munby P, at [55].
69 This argument should not be understood as suggesting that parental orders lack legal significance for intended parents, but rather that the impact of the order is more limited than the 'transcendental' language of the judgments suggests. I would like to thank Phillip Bremner for highlighting this point.
70 There is substantial literature on the complex interaction between law and identity in the context of assisted reproduction, see for example A Diduck, 'If only we can find the appropriate terms to use the issue will be solved': Law, identity and parenthood' [2007] CFLQ 458, A Bainham, 'Arguments About Parentage' (2008) 62 *Cambridge Law Journal* 322 and J Fortin, 'Children's right to know their origins – too far, too fast?' [2009] CFLQ 336.
71 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, per Munby P, at [69].
72 See, for example, *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 FLR 41 and *Re A and B (Parental Order)* [2015] EWHC 2080 (Fam), [2016] 2 FLR 446.
73 C Fenton-Glynn, 'The Difficulty of Enforcing Surrogacy Regulations' (2015) 74 *Cambridge Law Journal* 34, at p 36.
74 [2016] EWFC 42, [2017] 2 FLR 101.
75 [2015] EWHC 911 (Fam), [2016] 2 FLR 530.
76 Ibid, at [1]. As Russell J commented, at [45], '[t]here is no shying away from the fact that in this case the time which is elapsed is much longer than that which was in the contemplation of the President in *Re X*'.
77 Ibid, per Russell J, at [42].

discretion be exercised in all but, to quote Hedley J in *Re L*,[78] 'the clearest case of the abuse of public policy',[79] which in practice appears highly unlikely to arise. As a consequence of the decision in *Re X* the word 'must' in section 54(3) is deprived of any meaning,[80] and the entire subsection seemingly no longer has any purpose or effect.[81] Kirsty Horsey comments that, 'it appears from this decision – and similar others – that, in reality, where it is in the child(ren)'s best interests, there is now no real-time limit in the law within which a [parental order] application must be made, making somewhat of a mockery of the provision'.[82] Moreover, the judgment of Russell J in *Re A* reflects the focus on identity in *Re X*, stating, 'only parental orders will fully recognise the children's identity as the Applicants' natural children, rather than giving them the wholly artificial and, in their case, inappropriate status of adopted children'.[83] From these decisions, it is clear that the transformation of the apparently mandatory statutory time limit into a purely discretionary system is being justified on the basis that parental orders are the only option which appropriately recognise the identity of the child.

However, a contrasting interpretative approach was taken by Munby P in *Re Z (A Child) (Surrogate Father: Parental Order)*,[84] concerning the statutory requirement that a parental order can only be applied for by 'two people', illustrating the problems caused by 'judicial-led' reform of the law in this area.

The requirement for two applicants – Re Z (A Child)[85]

Section 54(1) of the 2008 Act refers to 'an application made by two people'. Prior to the decision concerning the six-month time limit in *Re X*, this provision had also been interpreted as being clear and unambiguous; in *B v C (Surrogacy: Adoption)*,[86] Theis J stated simply, '[a] single person is therefore unable to apply for a parental order'.[87] However, after the judgment in *Re X* (and other subsequent decisions) utilised a 'liberal'[88] and 'purposive'[89] interpretation of section 54(3), in *Re Z (A Child)*[90] the President was invited to 'read down' section 54(1) and grant a parental order to a single applicant. This case concerned a child, Z, who was born in the USA to a surrogate mother, using the single father's sperm and a third-party donor's egg.[91] The father obtained a judgment from the US court relieving the surrogate mother of any rights and responsibilities in relation to Z and establishing his sole parentage of Z.[92] However in the UK, under the terms of the 2008 Act, the surrogate mother is the legal mother and the father

78 *Re L (A Child) (Surrogacy: Parental Order*) [2010] EWHC 3146 (Fam), [2011] Fam 106.
79 Ibid, at [10].
80 M Welstead, 'Surrogacy: One More Nail in the Coffin' [2014] Fam Law 1637, at p 1637, described the decision in *Re X* as, 'hammering the nails into the coffin of s 54 of the Human Fertilisation and Embryology Act 2008'.
81 The judgments in *Re X* and other subsequent decisions fail to engage with the argument that this 'liberal' or 'purposive' interpretation of s 54(3) renders the provision devoid of any meaning, which is a result which surely Parliament cannot sensibly be understood to have intended, and the impact that this has upon an overall argument partially based upon interpreting s 54(3) in line with 'sensible' parliamentary intention.
82 K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24(4) *Medical Law Review* 608, at p 610.
83 *Re A and B (Children)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530, at [61].
84 [2015] EWFC 73, [2015] 1 WLR 4993.
85 Ibid.
86 [2015] EWFC 17, [2015] 1 FLR 1392.
87 Ibid, at [20].
88 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [64], Munby P observed that, '[i]n these circumstances the court is entitled, indeed in my judgment is bound, to adopt a more liberal and relaxed approach'.
89 See, for example, *Re A and B (Parental Order)* [2015] EWHC 2080 (Fam), [2016] 2 FLR 446, at [64], where Theis J stated, '[i]n relation to the time limit the President in *Re X* made it clear a purposive construction can be given to the time requirement in s 54(3)'.
90 [2015] EWFC 73, [2015] 1 WLR 4993.
91 Ibid, at [2].
92 Ibid.

did not have parental responsibility for Z.[93] In contrast to his decision in *Re X*, Munby P was not persuaded that he could depart from the statutory language of section 54(1) and the application for a parental order was refused. Welstead notes the distinction between the approaches of his two judgments, stating of *Re Z*, 'the decision appears to be a departure from the previous liberal approach of the judiciary in their interpretation of the surrogacy provisions of the HFEA 2008'.[94] The decision in *Re Z* is entirely framed in terms of 'reading down'[95] the statutory provision, under section 3 of the Human Rights Act 1998,[96] whereas in *Re X* the judgment was primarily premised on statutory interpretation, with the section 3 arguments merely a supplementary aspect of the decision.[97] Within the judgment in *Re Z* significant reference[98] is made to the House of Lords decision in *Ghaidan v Godin-Mendoza*,[99] which considered the interpretative role of the court under section 3 of the 1998 Act. The President refers to the judgment of Lord Rodger, who indicated the boundaries of permissible interpretation, and states: 'In para 111, he said that section 3(1) gives the court no power to "change black into white" or to remove "the very core and essence" or "pith and substance" of what Parliament has enacted'.[100] It is certainly arguable that the President's previous judgment in *Re X* sought to change 'black into white' in its interpretation of the six-month time limit in section 54(3); this starkly illustrates the contradictory approaches taken by the two judgments.[101]

It appears to be crucial within the judgment that, in contrast to *Re X*, the expressed parliamentary intention behind this provision could be identified, with the President stating, '[t]he principle that only two people – a couple – can apply for a parental order has been a clear and prominent feature of the legislation throughout'.[102] Underpinning this statement, the judgment quotes extensively from the Public Bill Committee debates on the 2008 Act; specifically the response of the Minister of State, Dawn Primarolo MP, to a backbench amendment that sought to allow parental orders for single people, where she stated, '[s]urrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the magnitude of that means that it is best dealt with by a couple'.[103] This reference to the 'magnitude' of surrogacy, when compared to adoption or IVF, which are both available to single people, is made more than once in the minister's statement.[104] However, it is far from clear from the statement itself what exactly is meant by the use of the term 'magnitude' in this context, and as Horsey observes, '[t]hough it is possible to see how Munby J felt his hands were tied, the sheer lack of interrogation that these comments have been subjected to is incredible. It is surely a magnitudinous decision when people who are not the parents of a child decide to adopt. Yet the government trusts single

93 Ibid, at [3].
94 M Welstead, 'Surrogacy Reform Due? [2015] Fam Law 1554, at p 1554.
95 For judicial interpretation of s 3 of the Human Rights Act 1998, see for example *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.
96 As the High Court had previously 'read down' for example s 54(4) in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] Fam 188. In *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993, Munby P, at [40], states, 'nothing I have said is intended to throw any doubt upon the correctness of the decisions . . . holding that it *is* permissible to "read down" sections 54(3) and 54(4) of the 2008 Act'.
97 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [58]–[61], Munby P stated that he would have been prepared to read down s 54(3) had he not been able to reach the result following the reasoning on statutory interpretation.
98 *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993, at [28]–[35].
99 [2004] UKHL 30, [2004] 2 AC 557.
100 *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993, at [33].
101 I would like to thank one of the anonymous reviewers for raising this point.
102 *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993, at [36].
103 Dawn Primarolo MP, *Hansard*, HC Deb, col 249 (12 June 2008).
104 Ibid: '[t]hat recognises the magnitude of a situation in which a person becomes pregnant with the express intention of handing the child over to someone else, and the responsibility that that places on the people who will receive the child'.

people in this situation, but not following surrogacy'.[105] Given the language in the judgments concerning other conditions in section 54 regarding the 'transcendental' importance or 'transformative' significance of parental orders, the lack of engagement with, or analysis of, the language of this ministerial statement in the judgment in *Re Z* is somewhat surprising. Nevertheless, on the basis of this parliamentary intention, the President goes on to state that interpreting section 54(1) in the manner argued for by the applicant, 'would be to ignore what is, as it has always been, a key feature of the scheme and scope of the legislation'.[106] It is not immediately clear why, in *Re X*, the time limit was not similarly considered a 'key feature of the scheme and scope of the legislation'.[107] Moreover, given the discussion above regarding the lack of academic consensus that Munby P's approach to statutory interpretation in *Re X* was correct,[108] I argue that the complete distinction drawn between the statutory provisions on the basis of 'parliamentary intention' is not as clear-cut as the reasoning of *Re Z* asserts.

Subsequently, in *Re Z (A Child) (No 2)*,[109] the President made a 'declaration of incompatibility'[110] regarding the requirement for 'an application made by two people' in section 54(1). Therefore, while the President was not prepared to adopt a 'liberal' interpretation of the provision, reflecting his approach in *Re X*, and grant a parental order to the single applicant in *Re Z*, he was prepared to hold that the provision was incompatible with Art 14 in conjunction with Art 8.[111] Indeed, the government conceded this point at the hearing.[112] Consequently, there will be some limited reform made to the regulation of surrogacy; to achieve this, the government introduced a remedial order in November 2017,[113] with the accompanying ministerial statement noting that: '[t]he Government will now introduce legislation to reflect an equal approach for a single person and couples in obtaining legal parenthood after a surrogacy arrangement'.[114] As well as this, as mentioned above, the Law Commission have included surrogacy within its upcoming 13th Programme of Law Reform;[115] suggesting that proposals for overarching reform will be forthcoming. However, regardless of the decision in *Re Z (No 2)* and this future law reform, the differences between the reasoning of the judgments in *Re X* and *Re Z* and the justifications for the contrasting outcomes continue to merit exploration.

---

105 K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24(4) *Medical Law Review* 608, at p 617.

106 *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993, at [37].

107 The President's use of this argument is notable, because another key feature of the amendments in the 2008 Act was the removal of the reference to 'the need of that child for a father' from s 13(5) of the 1990 Act. Therefore, it is certainly arguable that a 'key feature of the scheme and scope' of the 2008 Act is that it enables single women to exercise their procreative liberty by accessing fertility services and entering into parenthood should they chose to. Thus, it is surprising that this argument was not explored in the context of s 54(1) and the single male applicant in *Re Z*. I would like to thank one of the anonymous reviewers for raising this point.

108 See for example K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24(4) *Medical Law Review* 608 and K Norrie, 'English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation' [2017] CFLQ 93.

109 [2016] EWHC 1191 (Fam), [2017] Fam 25.

110 Human Rights Act 1998, s 4.

111 *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), [2017] Fam 25, at [19].

112 Ibid, at [12].

113 The remedial order will not address s 54(2)(c), which requires that couples who are neither married nor in a civil partnership be: 'two persons who are living as partners in an enduring family relationship'. There remains the possibility that after the two-person requirement is removed from s 54(1), the legislation will be potentially discriminatory towards couples who do not meet this 'enduring family relationship' threshold. This provides further evidence of the underlying policy significance of the traditional, binary, two-parent model in the regulation of surrogacy. I would like to thank one of the anonymous reviewers for highlighting this point.

114 Ministerial Statement of Mr Philip Dunne MP, 'Human Fertilisation and Embryology Act 2008: Remedial Order: Written Statement', 29 November 2017, HCWS282. At the time of writing, the remedial order has not been passed by Parliament (it is expected by Summer 2018). Therefore, the difference in reasoning between the President's judgments is not merely an academic point, because single applicants remain unable to apply for parental orders, see for example *M v F* [2017] EWHC 2176 (Fam), [2017] 3 FCR 511, whereas those couples who apply outside of the statutory 'time limit' are now able to apply.

115 *Thirteenth Programme of Law Reform*, Law Com No 377 (TSO, 2017).

The differences in approach and language between the judgments

The distinct (and surprising) lack of interaction between the reasoning of the two judgments is immediately striking, given the parallels between the two issues being considered and the fact that both judgments were given by Munby P. Bremner has commented of *Re Z* that, 'the High Court's decision to make a declaration of incompatibility rather than read down the provision to make parental orders available to single applicants seems somewhat arbitrary in light of the court's willingness to read down the other requirements, in particular the time limits, contained in section 54 of the 2008 Act'.[116] Many of the factors and considerations granted significance in terms of section 54(3) ('the welfare of the child', 'status' and 'identity') would prima facie appear to apply with similar force to section 54(1), but not only were these factors not granted this significance, they were barely considered at all in the judgment in *Re Z*. Similarly, the argument that is central to the decision in *Re Z*, whether the statutory provision can be 'read down' in accordance with the interpretative requirements of section 3 of the Human Rights Act 1998, is considered far more briefly in the judgment in *Re X*.[117] As a consequence of this disjuncture, the overlap and similarities between the underlying issues raised in these two cases is obscured and strangely under-explored within the judgment in *Re Z*. Fenton-Glynn has previously commented of the cases interpreting section 54, 'the courts have been willing to read down the statute to allow flexibility even in the mandatory provisions, if it is necessary to achieve justice'.[118] However, this flexibility was not apparent in *Re Z*, where the statutory provision was not read down and the application was not granted.

Moreover, there are notable differences between the judgments considering section 54(3) and the judgment in *Re Z* regarding the relationship between a parental order and an adoption order;[119] the judgments in *Re X* and *Re A* make clear that only a parental order would be able to properly reflect the 'status' and 'identity' of the children, as well as Russell J stating, in *Re A*, that adoption would be 'wholly artificial' for the children.[120] It is notable that this language fails to engage with the argument that a parental order, a relatively recent legal construct,[121] is also 'artificial' in all cases, because there is no 'natural' method of recognising parenthood in surrogacy arrangements, nor in any form of assisted reproduction.[122] This language and reasoning also implies that there is a fundamental substantive difference between parental orders and adoption orders justifying the departure from the terms of section 54(3), which is not reflected in the legal substance of those two orders.[123] I would not dispute that adoption is not a tailored solution for children born through surrogacy, due to the factual differences between the context of a surrogacy arrangement and an adoption. However, given the similarities between the practical effects of the two orders, I am unsure that the distinction between the orders justifies the approach taken to the terms of section 54(3) in these

116 P Bremner, 'Surrogacy and Single Parents Following *Re Z*' (2017) 21(2) *Edinburgh Law Review* 281, at p 282.

117 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, per Munby P, at [60], described his conclusion on this point as 'a fortiori' due to the reasoning of Theis J on 'reading down' s 54(4) in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] Fam 188.

118 C Fenton-Glynn, 'The regulation and recognition of surrogacy under English law: an overview of the case law' [2015] CFLQ 83, at p 94.

119 The framework for the making of adoption orders is set out in ss 46–51 of the Adoption and Children Act 2002.

120 *Re A and B (Children)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530, at [61].

121 Section 30 of the 1990 Act.

122 This inherent artificiality is why the regimes of the 1990 and 2008 Acts were required; the existing rules of 'natural' reproduction were unable to address the issues that arise in the determination of legal parenthood in cases of assisted reproduction.

123 There are significant differences between the procedural rules concerning parental orders and adoption orders. For example, adoption is facilitated by local authority 'adoption agencies', ss 2–17 of the Adoption and Children Act 2002, and s 92 prohibits the arranging of 'private adoptions'; whereas the unenforceability of surrogacy arrangements results in the absence of any statutory agencies and such arrangements necessarily being conducted between private individuals.

decisions.[124] As Norrie has observed, 'these distinctions are less significant than they might appear. They are differences of fact that do not in themselves require to be reflected in different orders'.[125] This lack of substantive difference is recognised by the judgment of Russell J, which observes that, '[i]n many ways in practical terms either parental orders or adoption orders will resolve the children's legal position by ensuring their rights to inheritance, pension entitlement, financial support in the event of their parent's separation and all other basic entitlements which flow from them having a legal parent–child relationship with the Applicants'.[126] In spite of acknowledging the lack of practical differences between the orders, Russell J states that, '[t]he orders are not the same, however. Nor are they intended to be as a matter of law and public policy'.[127] This disjuncture within Russell J's reasoning illustrates how the differences between the orders is asserted in the judgments as being based on reflecting the 'status' and 'identity' of the children, rather than on the substance of the order themselves.[128]

In his judgment in *Re X*, the President variously states that section 54 'transcends status',[129] refers to 'the very identity of the child as a human being'[130] and that '[a]doption is not an attractive solution given the commissioning father's existing biological relationship with X'.[131] Similar language was used by Russell J in *Re A*,[132] 'I was reminded and note that parental orders were created because Parliament, when debating the HFEA 1990, decided that it would be inappropriate for biological parents to have to adopt their own children. The very existence of parental orders is a testament to the decision of Parliament that adoption orders do not befit children born through surrogacy'.[133] The language used throughout the judgments considering applications under section 54 makes clear that the option of an adoption order is understood judicially as inherently problematic for couples who have undertaken surrogacy arrangements.[134] All of these statements appear to apply equally to the factual circumstances of the single applicant and the child in *Re Z* as they did to the applicants and the child in *Re X* and other such cases. In spite of this the court makes little use of a similar line of reasoning, and makes at most an unconvincing, under-rationalised attempt to distinguish *Re Z* from those cases that previously expanded the discretionary power of judges under section 54.

124 While an adoption order may be an 'imperfect' solution for a child born through surrogacy, that does not mean that it is not the best solution in circumstances when the statutory conditions for the granting of a 'parental order' in s 54 are not satisfied. However, the judgments considering s 54(3) appear to suggest a greater significance for this imperfect nature in allowing the court to depart from the statutory language.

125 K Norrie, 'English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation' [2017] CFLQ 93, at p 109.

126 *Re A and B (Children)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530, at [56]. In *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] Fam 188, at [30], Theis J commented that '[t]he effect of a parental order is the same as an adoption order'.

127 *Re A and B (Children)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530, at [56].

128 I accept that there is a conceptual distinction between the adoption process and the process of surrogacy arrangements. However, the judgments appear to envisage a similar conceptual distinction between adoption orders and parental orders, without properly engaging with, or fully articulating, the basis on which the orders themselves (rather than the processes) should be understood as conceptually distinct.

129 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, per Munby P, at [54].

130 Ibid.

131 Ibid, at [7].

132 *Re A and B (Children)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530.

133 Ibid, at [68].

134 See, for example, *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] Fam 188, where Theis J commented, at [30], '[o]nly a parental order would have the effect of *transforming* the legal status of the child such that both commissioning parents are recognised as being the legal parents of the child'.

While it may be that in *Re Z*, unlike in *Re X*,[135] the President felt himself to be entirely constrained by the statutory wording of section 54, the significance granted to the 'attractiveness' or 'appropriateness' of adoption as a solution in cases of surrogacy within the judgments remains strikingly different.[136] Indeed, in *Re Z* the President comments that:

> '[T]he contrast in this respect – obvious to any knowledgeable critic – between adoption orders and parental orders, which is a fundamental difference of obvious significance, is both very striking and, in my judgment, very telling. Surely, it betokens a very clear difference of policy which Parliament, for whatever reasons, thought it appropriate to draw both in 1990 and again in 2008. And, as it happens, this is not a matter of mere speculation or surmise, because we know from what the Minister of State said in 2008 that this was seen as a necessary distinction based on what were thought to be important points of principle.'[137]

Given the comments made previously by the President, and other judges, referring to adoption as 'not an attractive solution',[138] 'wholly artificial'[139] or 'inappropriate'[140] in cases regarding surrogacy, it is surprising that the President in *Re Z* appears to accept at face value the clear distinction made by the parliamentary language in the case of single applicants. The central question raised by this is: if it is 'inappropriate' for a couple to 'adopt their own children', why is it not similarly inappropriate for a single applicant to have to do so?[141] It is telling that this issue is not explored in significant detail within the judgment in *Re Z*. Indeed, it is striking that in *Re Z*, the President does not fully consider the relationship between the previous decisions on section 54(3), particularly the significance given to recognising the 'status' and 'identity' of the children, and the circumstances of the single applicant and the child in *Re Z*. The President commented in *Re X* that, 'a parental order presents the optimum legal and psychological solution for X and is preferable to an adoption order because it confirms the important legal, practical and psychological reality of X's identity: the commissioning father is his biological father and all parties intended from the outset that the commissioning parents should be his legal parents'.[142] It is difficult to understand how and why those factors were not granted the same consideration (if not necessarily the same significance in determining the outcome) within the President's analysis of the factual circumstances in *Re Z*.

I would not dispute that the aims of the President in *Re X* and the other judges who have followed his reasoning to allow for parental orders to be granted in a wider range of circumstances appear to be focused upon the best interests of children. As well as this, the judgments reflect the consensus of both academics[143] and other stakeholders[144] that the

135 Although, as discussed above, the validity of this explanation is far from uncontested.

136 This incoherency is not overcome by the subsequent 'declaration of incompatibility' in *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), [2017] Fam 25.

137 *Re Z (A Child)* [2015] EWFC 73, [2015] 1 WLR 4993, at [36].

138 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, per Munby P, at [7].

139 *Re A and B (Children)* [2015] EWHC 911 (Fam), [2016] 2 FLR 530, per Russell J, at [61].

140 Ibid.

141 It is worth noting the distinction between the position of the single (father) applicant in *Re Z* and couple applicants in other cases. The single father can have his parentage declared under s 55A of the Family Law Act 1986 (an option that is not available for the female member of the intended parents). Thereafter, the father could acquire parental responsibilities through an order under s 4(1) of the Children Act 1989, and then consequently be granted a 'Child Arrangements Order' in relation to the child's residence, under s 8. In this way, the purpose of the parental order (or the adoption order) would be to dislodge the surrogate mother from her parental status, not to replace her with someone else (as it would be in cases involving couples for the female member of the intended parents). However, this option was not considered by the President in *Re Z*. I would like to thank one of the anonymous reviewers for highlighting this point.

142 *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] Fam 186, at [7].

143 See, for example, K Horsey and S Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20(1) *Medical Law Review* 67 and K Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' [2010] CFLQ 449.

framework for attributing legal parenthood in cases of surrogacy is in need of fundamental reform.[145] However, normative agreement with the outcomes in these cases should not be conflated with accepting that the reasoning adopted in the judgments is sound, nor that this method of 'reform' is coherent or principled. As the Law Commission recently noted, 'courts have extended or modified many of the statutory requirements for a Parental Order, but case law has not been able to resolve the underlying problems in the statute, or find solutions to all difficulties'.[146] It is apparent throughout the cases considering section 54 that judicially led 'quasi-reform' has been a problematic approach to dealing with the issues that arise in the context of attributing legal parenthood in cases of surrogacy, because it is inherently 'case by case' and piecemeal. Therefore, there is no scope or opportunity for the necessary wholesale and overarching reform of the regulation of surrogacy that the Law Commission will be able to undertake.

The explanation for the divergence between the two decisions offered by the judgment itself, is that the distinction between the clearly expressed parliamentary language regarding single applicants and the lack of such ascertainable intention regarding the time limit necessitates the difference in approach. Consequently, the decision in *Re X* is able to ignore the seemingly unambiguous statutory language, while in *Re Z* the same approach cannot be utilised. However, as explored above, the President's approach to statutory interpretation in *Re X* is questionable and has not been universally accepted by academic commentators; Norrie has described it as 'contrary to [a] well-established rule of statutory interpretation'.[147] Therefore, as Bremner comments, 'given that the courts have breached a "bright line" rule (in relation to the six-month time limit) it remains unclear why, and unfortunate that, they did not pursue a similarly just result in *Re Z* by creating the facility for full single parenthood by surrogacy'.[148] On this basis, if the explanation offered by the judgments themselves is not universally or uncritically accepted, why then was the President prepared to adopt a 'creative' approach to interpretation in *Re X*, but not in *Re Z*? I argue that an explanation for this distinction is offered by the centrality of the binary, two-parent model, and the traditional, nuclear family within the policy underpinning the legal regulation of assisted reproduction and surrogacy. Moreover, I argue that this traditional paradigm of parenthood and family continues to be promoted by judicial language and decision-making.

The policy significance of the binary, two-parent model within assisted reproduction and surrogacy

The initial legislation governing the attribution of legal parenthood in cases of assisted reproduction, the Human Fertilisation and Embryology Act 1990 (the 1990 Act) was based upon the recommendations of the Warnock Committee Report.[149] The report was explicit as to its preferred model of family, stating, 'we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother'.[150] Writing in reference to the 1990 Act, Sally Sheldon observed that, '[p]arliament attempted to foresee every possible

144 See, for example, K Horsey, 'Surrogacy in the UK: Myth Busting and Reform: Report of the Surrogacy UK Working Group on Surrogacy Law Reform' (Surrogacy UK, November 2015).

145 It is certainly arguable that the need for law reform arises because judicial decisions have unravelled the conditions in s 54 and those statutory rules no longer appear coherent in light of this case law. The reform process has been driven by the judiciary, without the examination of overarching context that such fundamental reform requires. I would like to thank one of the anonymous reviewers for raising this point.

146 *Thirteenth Programme of Law Reform*, Law Com No 377 (TSO, 2017), para 2.42, at p 21.

147 K Norrie, 'English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation' [2017] CFLQ 93, at p 100.

148 P Bremner, 'Surrogacy and Single Parents Following *Re Z*' (2017) 21(2) *Edinburgh Law Review* 281, at p 286.

149 *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cm 9314 (1984).

150 Ibid, para 2.11.

reproductive scenario and to provide for the resulting family arrangement to conform as closely as possible to a nuclear family model'.[151] Thus, it is apparent that the promotion and protection of the traditional nuclear family[152] was influential in shaping the initial legislative approach to determining legal parenthood in cases of assisted reproduction.[153]

Julie McCandless and Sally Sheldon have observed of the reforms of the 2008 Act, that, 'the model of family underlying these provisions was barely considered by the reformers at all, not forming a core part of the reform project'.[154] This lack of scrutiny suggests that the values preferred in the 2008 Act's determination of legal parenthood were not the result of an explicit, conscious choice.[155] Instead, the model of family continues to reflect that which consciously underpinned the 1990 Act. While the reforms of the 2008 Act have widened the scope of legal parenthood in cases of assisted reproduction to allow for the possibility of two legal parents of the same sex,[156] this has been done without fundamentally altering or challenging the underlying basis of the provisions,[157] which is the binary, two-parent model, based upon the traditional, heterosexual, nuclear family. As Leanne Smith observes, 'legal parenthood remains an exclusive concept – albeit an exclusive concept that is now capable of embracing two parents of the same sex – designed to shore up nuclear families against the disruptive potential of the fragmentation of parenthood'.[158] Therefore, in spite of its reforms, the policy underpinning the 2008 Act's approach to the attribution of legal parenthood continues to be premised upon this traditional, two-parent model.[159]

This model does not apply straightforwardly in cases of surrogacy, because as Fenton-Glynn observes, '[t]he status provisions . . . were not designed with surrogacy in mind'.[160] The distinct issues raised by legal parenthood in cases of surrogacy are not dealt with explicitly by the 2008 Act's provisions for determining legal parenthood, which instead employs one unified approach to all cases of assisted reproduction.[161] As a consequence, Emily Jackson has observed that, '[t]he Human Fertilisation and Embryology Act's status provisions apply awkwardly and inappropriately to surrogacy arrangements'.[162] One reason for this awkwardness is that greater factual complexity is introduced into the process of determining legal parenthood in cases of

151 S Sheldon, 'Fragmenting Fatherhood: The Regulation of Reproductive Technologies' (2005) 68(4) *Modern Law Review* 523, at 541.

152 The importance of the traditional family is also illustrated by the reference to 'the need of that child for a father' in s 13(5) of the 1990 Act. For discussion of this controversial legislative provision, see, for example, G Douglas, 'Assisted Conception and the Welfare of the Child' (1993) 46 *Current Legal Problems* 53 and E Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65(2) *Modern Law Review* 176.

153 See further J Wallbank, 'Reconstructing the HFEA 1990: is blood really thicker than water?' [2004] CFLQ 387.

154 J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175, at p 182.

155 However, the Joint Committee on the Human Tissue and Embryology (Draft) Bill, HL Paper 169, HC Paper 630 (August 2007), stated, at para 263: 'Part 3 of the draft Bill seeks to take a new approach to parenthood, moving towards the concept of parenthood as a legal responsibility rather than a biological relationship', available at: www.publications.parliament.uk/pa/jt200607/jtselect/jtembryos/169/169.pdf.

156 Sections 42–48, which creates the possibility of legal parenthood for both members of a female same-sex couple in cases of assisted reproduction and s 54, under which same-sex couples can apply for 'parental orders'.

157 S Sheldon and R Collier, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, 2008) present an alternative analysis of the 2008 Act, suggesting that, at p 80: '[t]he fierce protection of the heterosexual nuclear family form entrenched in the 1990 legislation gives way to a more fluid and complex sense of familial relationships'.

158 L Smith, 'Clashing symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act 2008' [2010] CFLQ 46, at p 70.

159 Section 13(5) of the 1990 Act was amended by s 14(2) of the 2008 Act, replacing the reference to the 'father' with 'the need of that child for supportive parenting'. As with the other reforms of the 2008 Act, this linguistic change does not necessarily affect the underlying centrality of the binary, two-parent model.

160 C Fenton-Glynn, 'The regulation and recognition of surrogacy under English law: an overview of the case law' [2015] CFLQ 83, at p 84.

161 See, for example, R Fenton, S Heenan and J Rees, 'Finally Fit For Purpose? The Human Fertilization and Embryology Act 2008' (2010) 32(3) *Journal of Social Welfare and Family Law* 275.

162 E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart, 2001), at p 283.

surrogacy; where it is possible that, as Horsey identifies, 'a child can have up to six potential 'parents': two gamete providers, the gestational/birth mother and her husband or partner (if she has one) and the two intending parents, where these are different people. Notably this number is only limited to six because the law is only prepared to recognise two parents, the number could be greater were this not the case'.[163] These complex factual circumstances that may be present in cases of surrogacy sit uneasily within the unified approach to legal parenthood in cases of assisted reproduction, due to the reliance upon the binary, two-parent model and promotion of the nuclear family ideal.[164] Surrogacy fits awkwardly within a framework that is premised upon this exclusive two-parent model, because it introduces additional potential 'parents' into the 'natural' factual scenario.[165] As Rachel Cook observes, '[a] major moral concern in relation to these types of family formation is the fragmentation of parenthood. This fragmentation is more explicit in surrogacy than any other reproductive option'.[166] As a result of this dominant model, in cases of surrogacy the intention of the parties is ignored in determinations of legal parenthood at birth. Thus, the unified approach to the attribution of legal parenthood in all cases of assisted reproduction has the problematic consequence in surrogacy cases of creating legal results that can ignore both the genetic connections and the intentions of the parties, at the time the surrogacy arrangement was made.[167]

The law's attempt at a solution to the specific problems of the attribution of legal parenthood in cases of surrogacy was to create parental orders. However, these orders continue to reflect the two-parent model, allowing for legal parenthood to be transferred from the surrogate (and potentially her husband) to the intended parents, rather than acknowledging the potential for three (or more) 'parental' roles to exist simultaneously from birth. Moreover, when these orders were created by section 30 of the 1990 Act they were explicitly designed to protect the traditional nuclear family, because the orders were originally only available to married couples, who represent the archetypical couple within the nuclear family.[168] The provision creating parental orders was inserted at a late stage of the legislative process, in response to a complaint received by a backbench MP from constituents who had undertaken a surrogacy arrangement[169] and who objected to 'having to adopt "their children" '.[170] The resulting provisions of section 30 were 'rapidly drafted',[171] in an attempt to recognise the specific issues and to ameliorate some of the problematic consequences of the attribution of legal parenthood that arise in cases of surrogacy. However, this was explicitly only available to those people (married

163 K Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' [2010] CFLQ 449, at p 453.

164 See, for example, J Wallbank, 'Too Many Mothers? Surrogacy, Kinship and the Welfare of the Child' (2002) 10(3) *Medical Law Review* 271.

165 *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cm 9314 (1984), para 8.11, at p 45 states, 'to introduce a third party into the process of procreation which should be confined to the loving partnership between two people, is an attack on the value of the marital relationship'.

166 R Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation' in A Bainham, S Day Sclater and M Richards (eds), *What is a Parent?: A Socio-Legal Analysis* (Hart, 1999), at p 122.

167 The clearest example relates to circumstances where a surrogate is married. As a result of s 33 and s 35 of the 2008 Act, the surrogate will be the legal mother and her husband will be treated as the child's legal father at birth (unless he has not consented to the treatment); therefore, legal parenthood is attributed to a man with no genetic relationship to the child, who has no intention of having any social relationship with that child in the future.

168 For sociological accounts of the 'nuclear family', see for example D Gittins, *The Family in Question: Changing Households and Familiar Ideologies* (MacMillan, 2nd edn, 1993) and J Bernardes, *Family Studies: An Introduction* (Routledge, 1997).

169 Their dispute with the local authority became *Re W (Minors) (Surrogacy)* [1991] 1 FLR 385, prior to the coming into force of s 30 of the 1990 Act in November 1994.

170 The Brazier Report, 'Surrogacy: Review for Health Ministers Current Arrangements for Payments and Regulation' (Department of Health, October 1998), para 3.12, at p 20, available at: http://webarchive.nationalarchives.gov.uk/20130107105354/, www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4014373.pdf.

171 C Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Review Law* 59, at p 61.

couples) who fit within the traditional, binary, two-parent model which underpinned the overarching framework of the legislative regime. While the 2008 Act widened the scope of those couples who can apply for a parental order, to include same-sex couples and unmarried couples,[172] this expansion did not include single applicants,[173] and as set out above, the underlying model of family was not challenged or altered in the course of the reform process.[174]

Therefore, given this legislative and policy background, the divergence between the decisions in *Re X* and *Re Z* can be explained through the policy significance of the two-parent model within the legislative regime, which is clearly reflected by the parliamentary language referred to in *Re Z*.[175] This is unsurprising because 'parental orders' were explicitly designed for only married couples[176] and the underlying model of the legislative regime for parenthood was not altered by the reforms of the 2008 Act.[177] The contrasting decisions of the judgments illustrate the continuing significance of the two-parent model; in *Re X* and the subsequent cases considering applications made outside the 'time limit', a 'purposive' or 'liberal' interpretation of the statutory rule was employed to grant parental orders to 'deserving' two-parent families. Whereas in *Re Z*, maintaining the strict rule that a parental order can only be applied for by 'two people' does not extend the scope of parental orders outside of the traditional, two-parent nuclear family. Therefore, the disjuncture that is apparent between these judgments can be explained and understood as reflecting the underlying policy significance of the two-parent model to the legislative provisions concerning the attribution of legal parenthood in all cases of assisted reproduction, and the continued promotion of this model by judicial language and decision-making. However, while this underlying significance was explicit and uncontested in 1990, it is far from clear that this remains true, in spite of the approach taken by the President.

Conclusion

Notwithstanding my criticisms of the decision in *Re X*, set out above, it is apparent that Munby P sought what he perceived as a 'just' outcome, based upon the best interests of the child, in ignoring the clear statutory language of 'must', in section 54(3), and granting the parental order. Therefore, it is somewhat surprising that he did not adopt a similarly 'just' approach to the statutory language of section 54(1) in *Re Z*. The decision in *Re Z* is rendered problematic because of the 'liberal' and 'purposive' approach taken in previous decisions interpreting other conditions in section 54 of the 2008 Act; the decision in *Re Z* was not made in a context-free vacuum. Intuitively it seems as if the outcome in both cases should be the same. Either the statutory language is clear and unambiguous, meaning that parental orders should not be granted unless the statutory conditions are all met and consequently the decision in *Re X* is questionable.[178] Or as a result of a combination of the 2010 Regulations making the 'welfare of the child' the court's paramount consideration, a 'liberal' and 'purposive' approach to statutory interpretation and section 3 of the Human Rights Act 1998, then the importance of properly recognising the 'status' and 'identity' of the children has become the determinative issue, meaning that parental orders should be granted in virtually all circumstances, absent 'the

172 Section 54(2).
173 Section 54(1).
174 See, for example, J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175.
175 The statement, quoted above, of the Minister of State Dawn Primarolo MP, *Hansard*, HC Deb, col 249 (12 June 2008) that '[t]he Government are still of the view that the magnitude of that means that it is best dealt with by a couple'.
176 Section 30(1) of the 1990 Act.
177 See further J Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) *Modern Law Review* 467.
178 As well as the subsequent decisions on s 54(3), see, for example, *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 FLR 41, the decision on s 54(4) and (5) in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] Fam 188, and the line of authority concerning 'reasonable expenses' in s 54(8), see, for example, *Re D and L (Surrogacy)* [2012] EWHC 2631 (Fam), [2013] 2 FLR 275.

clearest case of the abuse of public policy',[179] and consequently the decision in *Re Z* is questionable. Thus, I argue that the divergent outcomes of these cases are problematic, because they seemingly amount to an attempt by the judiciary to take both of these approaches simultaneously in relation to different conditions within section 54, in an unconvincing manner that has a highly contestable justification. This article offered the explanation that the incoherence between the judgments can be partially understood as reflecting the continuing policy significance of the binary, two-parent model and the traditional nuclear family within the legal regulation of assisted reproduction and surrogacy in the 2008 Act.

Given that there is a growing consensus that the current legislative approach is problematic and the welfare of the child is the court's paramount consideration in determining applications for parental orders, it is understandable that judges are seeking 'creative' solutions to achieve what is perceived to be the 'right' result of granting the order. However, there are clearly limits to the efficacy of such a judicially led approach to resolving these underlying legislative issues, as the President's decision in *Re Z* illustrates. Fenton-Glynn has previously commented that:

> 'there is an urgent need to review the regulation of surrogacy, both in this country, and internationally. Until this occurs, the courts will continue to have little choice but to stretch, manipulate, or even disregard the statutory wording in order to achieve justice for the child'.[180]

While I agree with the suggestion that the current legal regime regulating surrogacy is unsatisfactory and in need of reform, I argue that the judgments considering the interpretation of section 54 of the 2008 Act illustrate the problems caused by attempts at 'reform' led by the judiciary. This is because such judicial 'reform' is inevitably piecemeal, somewhat contradictory and necessarily lacking the required coherent underpinning purpose and philosophy. Horsey observes that, 'the law regulating surrogacy in the UK is increasingly out of date and failing to adequately protect the best interests of children and families'.[181] The contradictory decisions and messages of the judgments in *Re X* and *Re Z* provide a clear illustration of the problems with the current legal regime governing surrogacy and show the need for wholesale and principled legislative reform of the regulation of surrogacy arrangements that the Law Commission is now in the process of considering.

179 See, for example, *Re L (A Child) (Surrogacy: Parental Order)* [2010] EWHC 3146 (Fam), [2011] Fam 106.

180 C Fenton-Glynn, 'The Difficulty of Enforcing Surrogacy Regulations' (2015) 74 *Cambridge Law Journal* 34, at p 36. See further A Alghrani and D Griffiths, 'The regulation of surrogacy in the United Kingdom: the case for reform' [2017] CFLQ 165.

181 K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24(4) *Medical Law Review* 608, at p 608.